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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/833,314	04/10/2001	Christophe Dupont	112701-239	4353

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BELL, BOYD & LLOYD LLC
P. O. BOX 1135
CHICAGO, IL 60690-1135

EXAMINER

WEINSTEIN, STEVEN L

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 03/30/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/833,314

Applicant(s)

DUPONT ET AL.

Examiner

Steven L. Weinstein

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 12 December 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-17 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-17 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

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Upon reconsideration, in view of a newly discovered definition of the word "tube", which confirms the examiner's understanding of the broader meaning of the word, expressed earlier in the prosecution, and upon further review of applicant's urgings in the Brief, the Final Rejection, mailed 7/13/05, is hereby withdrawn and prosecution is therefore re-opened and the following rejection made.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless --

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

Claims 1,2,5,8,9,13,15 and 17 are rejected under 35 U.S.C. 102(a) as being anticipated by May et al ('219) with Webster's Unabridged Dictionary, Hammerstein (1,720,788), Lockwood (3,156,350), and Lucich (3,207,642) being relied on as evidence of anticipation by May et al.

May et al discloses a canned pet food product having an upper and lower end; the product comprising an outer tubular phase which is substantially solid and which extends from the lower end to the upper end and which includes an edible source of carbohydrate and protein, and an inner phase which extends from the lower end to the upper end and including an edible source of carbohydrate and protein with the inner phase having an appearance different from the outer phase and extending within the outer phase. In regard to the outer phase being "tubular", upon further consideration,

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the word "tubular" does not restrict the structure to only a cylindrical shape. As evidenced by Webster's Unabridged Dictionary, a tube is a hollow elongated, usually cylindrical, body. Thus, a structure can be referred to as tubular and not be cylindrical. In fact, Hammerstein (p.1, col.1, l.30 plus), Vito (col.4, l.60 plus), Lockwood (col.1, l.45 plus), and Lucich (col.5, l.3 plus), are all relied on as further evidence that in common usage, the word tubular or tube is not restricted to a specific geometry. Thus, May et al, who unequivocally teaches that the recess can extend entirely through the outer layer (May's "base" layer) to form a frustoconical recess (p.9, para.2), does teach a tubular outer layer. In regard to the recitation, "an outer tubular phase which is substantially solid", since May et al discloses the outer layer (i.e. "base" layer) comprises solid food pieces that constitute 80% of the outer layer, May et al is construed to read on an outer tubular phase which is substantially solid. If 80% of a constituent is solid material, then that material can be construed as being substantially solid. The recitation does not limit whether or not the solid material is all one continuous body. The phrase has not been otherwise defined. Note, too, however, that May et al disclose on p.11, para.1, that the outer layer (May's "base" layer), which comprises the solid pieces and gravy, retains its shape during transfer to the filling machine. In regard to claim 2, which is a product by process claim, since the positive product recitations are anticipated by May et al, and there are no apparent differences in the product as recited, the product by process recitations are not seen to impart patentability to the product claim. Note, too, however, that May et al does teach the process steps as recited. In regard to claims 5 and 8, May et al does teach the recited inner to outer phases and the moisture contents.

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The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 7, 14, and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over May et al in view of Quaker Oats ('351). These claims, which recite a product height/diameter relationship have been previously addressed; e.g. in the Office action mailed 9/3/03.

Claims 1-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ohba et al (Ep '252) in view of Vickers (GB '760) and May et al (WO'219), or vice versa, i.e., Vickers in view of Ohba et al and May et al both further in view of Quaker Oats (GB '351), and Bechtel ('847) further in view of Gutmann ('199), Froebel et al (GB '125), Zitin ('095), Dodge et al ('712) and), further in view, Henkel (GB, '634), Mandanas (WO '606), Routh ('901), McMahan (GB '351), Errass (Ep '046), Hillebrand (Austral. '797/96), QP Corp (Jp '677) and QP Corp (Jp '174), further in view of applicants admission of the prior art and newly cited Diaz (5,518,746), Hoashi (JP 62-104566), Honma et al (JP59-159758), and Sonoya (JP57-12987), for the reasons given in the Office actions mailed 1/4/05, 2/9/04, 6/3/03 and 11/14/02.

In regard to claim 1, Ohba et al discloses a canned pet food having two phases which included protein and carbohydrate, wherein the phases have different appearances. Claim 1 differs from Ohba et al essentially in the fact that the two phases form an outer tubular phase and an inner phase as opposed to the phases shown in the

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drawings. As evidenced by Vickers, it is notoriously conventional to provide composite food products wherein the phases form an outer tubular phase and an inner phase.

Vickers, e.g. teaches the phases can be meat products and differ from each other in their texture and appearance with the outer phase retaining a softer filling. May et al is further evidence of providing two composite food products and specifically, pet food products, wherein there is an outer phase and an inner phase. May et al also teaches the composite food is canned, which, of course, is a notoriously conventional packaging expedient for all types of food. Froebel et al, although teaching individual composite food pieces, nevertheless further evidences that composite concentric, food products such as pet food products are well established in the art. The art taken as a whole teach other composite tubular products with inner variant phases. To therefore modify Ohba et al and change the shape of the two composite phases from one conventional shape to another conventional shape is seen to have been obvious. As noted previously, the art taken as a whole teach to provide composite food products, which differ in appearance and texture, to create new and interesting appearances which is applicants objective as well. The remainder of the references applied are relied on for the reasons of record.

Applicants admission of the prior art is further evidence of two composite pet foods of the type recited have been previously combined; albeit in a different configuration, i.e. a matrix of meat loaf, i.e. solid pet food surrounding pieces of formulated emulsion pet food products. Diaz, Hoashi, Honma et al and Sonoya are relied on as even further evidence that combining two food components to form a composite food product having different appearance, texture, etc., is, of course, notoriously conventional and that the

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composite can assume various geometric configurations from layered parallel side-to-side configurations to tubular to variants thereof. In regard to the claims which recite the specifics of the phases, May et al can be relied on to teach applicant is not the inventor of the compositions and to modify Ohba et al and substitute one conventional composition for another conventional composition would therefore have been obvious. Similarly, in regard to the method of making the canned product, it would have been obvious to modify the combination and provide a core and fill the core in view of the art taken as a whole for the reasons of record. Similarly, employing Vickers as the primary reference, since Vickers teaches composite foods with different appearances in their phases imparts increased interest in the food and have been provided in tubular form with an inner phase, To modify Ohba et al and employ two conventional pet food phases and to employ conventional canning for their art recognized and applicants intended function would have been obvious in view of the art taken as a whole.

All of applicants' remarks filed 4/6/05 have been fully and carefully considered but are not found to be convincing for the reasons of record. Note that the secondary art does not have to teach pet food in a composite concentric arrangement since May et al already teaches pet food in cans in a composite pattern. The secondary art is relied on to show that composite concentric arrangements of products including foods is notoriously conventional. Applicants' are therefore employing a known composite pattern/design and achieve no new unexpected result therefrom.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Steven L. Weinstein whose telephone number is 571-

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272-1410. The examiner can normally be reached on Monday-Friday from 7:00AM to 2:30PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Steve Weinstein
STEVE WEINSTEIN
PRIMARY EXAMINER 1761